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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 661

RICHARD ALLEN ET AL., APPELLANTS

v.

STATE BOARD OF ELECTIONS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MEMORANDUM FOR THE UNITED STATES

This memorandum is submitted in response to the Court's order of December 4, 1967, inviting the Solicitor General to state the views of the United States.

STATEMENT

In the case of Virginia (J.S. 5a), five other States and certain additional counties (see 30 Fed. Reg. 9897), the Attorney General and the Director of the Census have made the determinations which bring into play the prohibition of Section 4(a) of the Voting Rights Act of 1965, 42 U.S.C. (Supp. I) 1973b(a), upon the use of "any test or device" to bar voting in State, federal, or local elections. Virginia itself determined

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that the part of Section 24–252 of its Code that requires write-in votes to be cast in the voter's "own handwriting" was suspended insofar as it applies to illiterates (R. II, 12).

Appellee Board of Elections subsequently instructed all persons who were to serve as judges in Virginia's 1965 general election that any voter "who is unable to mark or cast his ballot, in whole or in part, because of a lack of literacy * * * shall, if he so requests, be aided in the preparation of his ballot by one of the judges of election selected by the voter." (J.S. 7a.) Such assistance to illiterate voters was in addition to, and apparently thought like, that which Section 24–251 of the Virginia Code makes available to a physically disabled person "by one of the judges of election designated by himself," and to any blind voter "by a person of his choice." The instruction, in addition, required that such a judge "shall not in any manner divulge or indicate, by signs or otherwise, the name or names of the person or persons for whom any voter shall vote." (J.S. 7a.) It was the apparent intention of the Board of Elections that any illiterate voter wishing to cast a write-in vote and requiring assistance should do so by requesting a judge of the election to assist him by writing the vote in the judge's handwriting. It appears to have been the intention of the Virginia authorities to apply the 1965 instruction in all future elections. (J.S.7a.)

Appellants are functionally illiterate registered voters for the Fourth Congressional District of Virginia (J.S. 1a). Wishing to vote for S. W. Tucker, a write-in candidate in the 1966 elections for the United States House of Representatives, each plaintiff at-

tempted to cast that vote by pasting on the ballot in the appropriate blank for write-in votes a "sticker"—a gummed label on which Tucker's name was printed—and then marking an X in the appropriate place (J.S. 1a–2a). The appellee election officials refused to count the several thousand votes cast in this manner (J.S. 2a), apparently considering them improperly cast because they were not handwritten by either the voter or a judge of the election.[1]

Appellants then brought this case, seeking a declaratory judgment that § 24–252 of the Virginia Code and the procedures appellee Board of Elections substituted therefor in the case of illiterate voters violate the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act of 1965. The case was tried by a three-judge district court[2] on affidavits and exhibits. There appears to have been no controversy as to any question of fact.

On May 2, 1967, the three-judge district court, in an opinion by then District Judge Butzner, denied the appellants' prayer for injunctive relief and dismissed the compliant (J.S. 1a–9a). The court held: "The propriety of stickers is a matter for legislative, not judicial determination. * * * [E]xclusion of illit-

[1] This refusal apparently did not affect the outcome of the election. The vote for Tucker and his two opponents was as follows: Abbitt, 45,226; Silverman, 14,827; Tucker, 7,907 (R. 61). For this reason appellants sought prospective relief.

[2] The jurisdiction of the district court was invoked under 28 U.S.C. 1331, 1343 (3), (4) and 2201 to enforce rights guaranteed by the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act of 1965, 42 U.S.C. (Supp. I) 1973 *et seq.*; the three-judge court was sought and convened pursuant to 28 U.S.C. 2281 and 2284.

erate persons from voting, if no other discrimination is practiced, does not violate the Fourteenth Amendment" (J.S. 3a, 4a) and "[t]he requirement that a write-in candidate's name be inserted in the voter's handwriting is not a test or device defined in 42 U.S.C. 1973b(c)" (J.S. 7a). The appellants have filed a timely appeal from this decision, invoking this Court's jurisdiction under 28 U.S.C. 1253.

DISCUSSION

1. We believe this Court has jurisdiction because the constitutional question presented to and decided by the three-judge district court was not "obviously without merit" and was not foreclosed as clearly unsound by previous decisions of this Court. Cf. *California Water Service Company* v. *City of Redding*, 304 U.S. 252, 255. That question is whether Virginia, in the procedure it has required illiterates to follow when casting write-in votes, has, in a manner consistent with the Equal Protection Clause of the Fourteenth Amendment, accorded illiterate voters the same right to a secret ballot as Virginia law vouchsafes to literate voters. Thereby tendered are such subsidiary issues as whether Virginia may require an illiterate to vote in the handwriting of a State-appointed election judge whose duty of secrecy is not reinforced by the threat of criminal sanctions, while at the same time allowing a literate voter to write his own vote, a physically handicapped voter to be assisted by an election judge who is subjected to criminal penalties if he discloses the nature of the vote, and a blind person to vote in the handwriting of a person of his own choosing.

It was clearly proper to join with the constitutional question a statutory claim for relief based on the 1965 Act. See, e.g., *Zemel* v. *Rusk*, 381 U.S. 1, 6 and n. 2. Therefore, this Court has jurisdiction of the statutory, as well as the constitutional, questions.

2. The designation of Virginia as a State subject to Section 4 of the Voting Rights Act of 1965 made it subject to two disabilities that are pertinent here. First, Virginia was forbidden to make compliance "with any test or device" a condition of voting or registration to vote. Because "test or device" is defined to include "any requirement that a person * * * demonstrate the ability to * * * write * * * any matter," Section 4(c) of the Act, 42 U.S.C. 1973b (c)(1), all Virginia laws making literacy a prerequisite to voting were thereby suspended. We believe that Virginia was correct in concluding—and conceding in the district court—that its statutory procedure for write-in votes was among the suspended provisions, at least insofar as it applies to illiterates.

The second pertinent provision of the 1965 Act, and the one we suggest should be dispositive of the present case, is Section 5, 42 U.S.C. 1973c. That part of the statute suspends in any State subject to the prohibitions of Section 4 the operation of "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 * * * ." Relief from the suspension of any rule falling within this provision may be secured by either of two procedures: (1) submission of the rule to the Attorney

General, in which case it may be used if no objection is interposed within 60 days; or (2) obtaining a declaratory judgment from the United States District Court for the District of Columbia that the rule "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color * * *." 42 U.S.C. 1973c; see *South Carolina v. Katzenbach*, 383 U.S. 301, 319–320, 333–334.

The instruction that appellee Board of Elections gave Virginia election judges in 1965 did not expressly deal with the problem of illiterates who wished to cast write-in votes. It was, on its face, an attempt to provide assistance to illiterates in casting their ballots—an effort made by four other States subject to the 1965 Act only after a district court had rendered an appropriate decree upon the petition of the United States.[3] It was also necessary, however, to provide in some manner a means by which illiterates could cast write-in ballots. This was accomplished by allowing illiterates to cast write-in votes in the handwriting of an election official.

The result was assuredly a "practice, or procedure with respect to voting different from that in force or effect on November 1, 1964 * * *." It would appear to follow that the new requirement could not be used without first passing the scrutiny of either the Attorney General or the United States District Court for the

[3] *United States* v. *States of Louisiana*, 265 F. Supp. 703 (E.D. La.), affirmed *per curiam*, 386 U.S. 270; *United States* v. *State of Mississippi*, 256 F. Supp. 344 (S.D. Miss.); *United States* v. *Executive Com. of Dem. Party of Greene Co., Ala.*, 254 F. Supp. 543 (N.D. and S.D. Ala.); *United States* v. *County Executive Com. of Dem. Party of Clarendon County, S.C.*, C.A. No. 66–459 (D.S.C.).

District of Columbia. 42 U.S.C. 1973c. Neither step was in fact taken.[4]

To be sure, there may be circumstances where the failure to comply with Section 5 will be more a formal than a substantive defect. For example, in *South Carolina* v. *Katzenbach, supra,* the Attorney General indicated during argument that he would not interpose an objection to a Mississippi provision extending the closing hours of the polls from 6 p.m. to 7 p.m. 383 U.S. at 320.

Were this also a case where it was clear that the Attorney General would not interpose an objection, we would so state, and thus avoid a purely formalistic rite that would merely delay final determination. We do not believe, however, that the facts of this case admit of so easy a solution to the failure to comply with Section 5. The test to be applied to a practice or procedure submitted pursuant to that section is whether it had "the purpose" or "will * * * have the effect of denying or abridging the right to vote on account of race or color * * *" (42 U.S.C. 1973c).[5] On its face, Virginia's procedure for the casting of write-in votes

[4] Appellants did not rely on Section 5 in the district court but invoke it for the first time in their Jurisdictional Statement (at p. 20). The question, however, is a pure legal issue which may be resolved on the basis of the present record. Since the facts which give rise to that issue are framed by the complaint and are not subject to dispute, this Court could, in all events, consider the issue *sua sponte*. See *Boynton* v. *Virginia*, 364 U.S. 454, 457; cf. *Bell* v. *Maryland*, 378 U.S. 226, 237–242.

[5] The quoted text is, under the statute, to be applied in suits brought under the section in the District of Columbia court. Since that court may approve the use of a practice or procedure to which the Attorney General has objected, we think it evident that the Congress intended the Attorney General, in his scrutiny, to apply the same standard.

by illiterates has no such purpose, and the Attorney General does not now have evidence that such a purpose existed.

But, of course, the very purpose of the submission is to allow the Attorney General to investigate and to consider the facts, and determine whether he believes an improper purpose existed. Moreover, even were there to appear no evidence of such a purpose, the Attorney General would still have occasion to determine the likely effect of Virginia's write-in procedure on the rights guaranteed by the 1965 Act. For example, the Attorney General would find it necessary to compare Virginia's procedure with the relief the United States requested in four other States subject to the 1965 Act. In general terms, the courts were asked to direct election officials to provide assistance to illiterates, and, at the same time, to allow either federal observers, if present, or a private person of the illiterate voter's choosing to observe the casting of the illiterate's vote by the State official. The basis for this approach was the view that the presence of a State official, and no other person in the voting booth, may inhibit the freedom of choice of a previously disenfranchised illiterate Negro voter. The procedure requested was in fact very similar to the one Virginia by statute allows in the case of blind voters.

In particular, Virginia's procedure would have to be contrasted with the relief requested and secured in *United States* v. *Louisiana,* 265 F. Supp. 703, 713 (E.D. La.), affirmed *per curiam,* 386 U.S. 270. There the Attorney General requested, and the court directed, that Louisiana—another of the States subject to the

prohibitions of Section 4 of the 1965 Act—assist illiterates in voting. To this extent, the relief was similar to the instructions appellee Board of Elections issued to Virginia election judges. There were, however, significant additional features in the relief secured that are not present here. Thus Louisiana was directed to allow a representative of an opposing candidate to observe the vote, and to allow the illiterate, if he so requested, the presence of a federal observer in the voting booth. Moreover, election officials granting such assistance to illiterates were ordered, subject to the sanctions of contempt, to maintain absolute secrecy.

Only a submission by Virginia, in the manner Congress indicated in Section 5, would enable the Attorney General to perform the responsibilities which Congress imposed on him with respect to new procedures adopted in States made subject to Section 4.

3. For the above reasons, we believe this to be a case where the courts need not, and should not, adjudicate the legal issues raised until such time as Virginia follows the procedures that Section 5 ordains. Cf. *Far East Conference* v. *United States*, 342 U.S. 570. Because it is clear that Virginia, in 1966, failed to comply with Section 5, we suggest that the district court should be directed to grant such relief as is necessary to guarantee that Virginia will refrain from imposing restrictions upon the manner of casting write-in votes pending compliance with that Section. We suggest that the following considerations would be highly relevant in fashioning that relief: (1) That there is an evident need and justification for affording to illiterates the opportunity for assistance by some

person other than (or at least in addition to) a State election official; (2) that the Commonwealth of Virginia has a legitimate interest, which its legislature has expressed in the now-suspended Section 24–252 of its Code, in avoiding the possibilities of fraud that various States have detected in the use of stickers for write-in votes;[6] and (3) that there seems little reason to deny to illiterates the benefits of a procedure which the State has freely adopted in the case of blind persons who, like illiterates, are unable by themselves to verify the accuracy of a vote cast by an election official.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

STEPHEN J. POLLAK,
Assistant Attorney General.

FEBRUARY 1968.

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[6] It is questionable, however, that the use of a State election official is a rational implementation of the policy that underlies the statute, which is apparently based on the view that the variations in handwritings would lessen the chances of one person fraudulently casting multiple votes. Compare *Morris* v. *Fortson*, 261 F. Supp. 538 (N.D. Ga.), where it was provided that no one person could assist more than ten voters.

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